United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Orig w/ affidavit of mailing

75-2051

To be argued by
PAUL B. BERGMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2051

P
P/S

JOHN "SONNY" FRANZESE and
NICHOLAS POTERE,
Petitioners-Appellants,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2051

JOHN "Sonny" FRANZESE and NICHOLAS POTERE,
Petitioners-Appellants,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

John "Sonny" Franzese and Nicholas Potere appeal a denial of post-conviction relief sought pursuant to 28 U.S.C. § 2255 by a motion for the grant of a hearing, the setting aside of convictions allegedly obtained through the Government's knowing use of false and perjurious testimony, and the vacation of sentences imposed. The motion was denied in a Memorandum of Decision and Order entered March 14, 1975 in the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*). Appellant Franzese is presently confined in the penitentiary at Leavenworth, Kansas; appellant Potere is released on parole.

On appeal, appellants claim that the district court applied "erroneous and irrelevant legal procedures and standards to determine whether appellant[s] should have been granted a new trial and whether appellant[s] [were] entitled to an evidentiary hearing" (Brief for Appellant

Franzese at 1). Appellant Potere makes an additional claim that the district court erred in not compelling production of the informant whose testimony led to the arrest of Eleanor Cordero, or alternatively directing the Government to file under seal any and all information concerning, or derived from, the informant in question (Brief for Appellant Potere at 2).

Statement of the Case

A. The 1967 Trial of Appellants.

(1)

Judgments were entered against appellants Franzese and Potere in the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*), on April 14, 1967, following a jury trial convicting them, along with co-defendant Joseph M. Florio, of robbery of two federal savings and loan associations by placing lives in jeopardy in violation of 18 U.S.C. §§ 2113(d) and 2, and, along with co-defendants Florio, William David Crabbe and John Matera, of receiving stolen currency and traveler's checks from a third bank in violation of 18 U.S.C. §§ 2113(c) and 2 and conspiracy to rob these three and other federally insured banks in violation of 18 U.S.C. §§ 371 and 2. They were sentenced to total maximum terms of fifty and fifteen years imprisonment respectively.

Co-defendants John Cordero, Richard Parks and James Smith had pled guilty and testified at the trial. Charles Zaher, another confessed participant, was also a key witness at the trial. Co-defendants Anne Messineo and Anthony Polisi were severed before trial and the charges against them were later dismissed. *See United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969). Eleanor Cordero was arrested but not indicted.

The judgments against appellants were affirmed by this Court. *United States* v. *Franzese*, 392 F.2d 954 (2d Cir. 1968). The Supreme Court denied certiorari in the case of appellant Potere, but vacated Franzese's conviction and remanded his case for further proceedings in conformity with *Alderman* v. *United States*, 394 U.S. 165 (1969). *Giordano* v. *United States*, 394 U.S. 310 (1969). After a hearing on the legality of certain electronic surveillance, a new final judgment of conviction was entered against appellant Franzese on March 26, 1970.

(2)

The prosecution of this case in 1967 arose out of a series of bank robberies in 1965. The Government's case "rested almost entirely on the testimony of [the] four accomplice witnesses—Smith, Parks, Cordero and Zaher—who cast the defendants in the role of behind-the-scenes operators of a nation-wide bank robbery business [footnote omitted]. Franzese was the general manager; Potere was the procurer and explicator of plans of the banks and took general charge of logistics. . . ." *United States* v. *Franzese*, *supra*, 392 F.2d at 954. The witnesses testified to a series of meetings in late July, 1965, at the first of which Franzese took over from Anthony Polisi as general manager, and at which various bank robberies were planned.[1]

---

[1] Nondisclosure at the 1966 trial of a related case of information as to Anthony Polisi's less significant role after the first of these meetings led to the granting of his motion for a new trial. *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969). This information, first disclosed at the trial of the appellants herein, was inconsistent with Smith's and Park's characterizations of Polisi at the earlier trial as manager of the robbery ring at the time the July 30 robbery, the first of the two robberies charged in the instant case, was planned. On his successful motion, Polisi alleged a "conspiracy" on the part of the four accomplices, based on "their fear of the Franzese defendants," and the suppression of statements in 1965 (1) by John Cordero implicating Franzese as of about mid-July 1965; and (2) by Zaher characterizing Franzese as "boss" of some earlier robberies as well. *Id.* at 576.

At the trial the Government was allowed to rehabilitate Smith, Parks and Cordero who had been impeached on the basis of prior inconsistent statements given to the F.B.I., before the Polisi grand jury and at the Polisi trial, by eliciting some limited testimony that their previous failure to mention the defendants was due to fear for the safety of themselves and their families. This use of rehabilitation testimony was affirmed on appeal. *United States* v. *Franzese*, *supra*, 392 F.2d at 959-61.

The appeal also upheld the trial court's refusal to compel the Government to divulge the name of the informer who had implicated Eleanor Cordero, John Cordero's wife, in the robbery scheme. Noting that "[e]vidence that a witness [*viz.*, John Cordero] had lied in refusing to implicate an unrelated person not indicted [*viz.*, Eleanor Cordero] would be inadmissible even under the test of 'collateralness' approved by Wigmore," this Court held that:

> ". . . the jury had already heard so much on [the] subject [of John Cordero's bias and corruption], including Cordero's own rather equivocal testimony as to his wife's involvement, which the judge expressly called to their attention in his charge, that the incremental value of evidence by the informer was outweighed by the opposing considerations. . . ." (392 F.2d at 962.)

The appellants had raised an additional argument on this point described and answered by this Court as follows:

> Stressing the Government witnesses' opportunities to develop a consistent story while living together in jail, they argue that, as said in Franzese's brief, 'it was of the utmost importance to the defense to show that the exclusion of Mrs. Cordero by the connivance of the gunmen was related, part and parcel, to the objective of keeping Mrs. Cordero out of the case lest she become an uncontrollable link in the govern-

> ment's chain of proof.' The suggestion, apparently, is that if the informer had implicated Mrs. Cordero, the defendants might have called her or the Government might have considered itself forced to call her, with consequences no one now can tell. Apart from the fact that nothing prevented the defense from calling Mrs. Cordero, it suffices that this theory was never presented to the trial judge. (392 F.2d at 962-63.)[2]

Among the other issues raised on appeal was the return to Eleanor Cordero of $9,800 of the $10,000 seized at her and her husband's arrest. The Court summarized the contention as follows: "Conceding as they must that the return of the money was fully before the jury, [footnote omitted], appellants argue on appeal that this was 'dirty business' requiring at minimum a new trial in which any testimony by [John] Cordero would be excluded." 392 F.2d at 963. While disapproving of the abbreviated procedure by which the money was returned, this Court found no basis for disturbing the return of the money pursuant to the order of Judge Mishler or for the other relief requested.

B. Appellant Franzese's first motion for a new trial (438 F.2d 536, *aff'g* 321 F. Supp. 993).

Appellant Franzese's first motion for a new trial on the ground of newly discovered evidence was denied as the evidence, the United States Attorney's memorandum of an interview with the four accomplice witnesses, was found not to have been producible at the trial under 18 U.S.C.

---

[2] In a footnote (392 F.2d at 963, n. 11) the Court stated that examination of the F.B.I. intra-office memoranda as to the informer indicated that they were not producible and that they contained only exceedingly vague information as to Eleanor Cordero. It should be noted that on the instant motion appellant Potere requested the court's inspection, not of written information, but of "all of the [Government's] knowledge concerning the informant" (Brief for Appellant Potere at 10).

§ 3500 or *Brady* v. *Maryland*, 373 U.S. 83 (1963) as alleged, and to contain at best impeaching statements of the four not inconsistent with the trial testimony in any material respect, cumulative and not of the kind which would probably produce a different verdict. *United States* v. *Franzese*, 321 F. Supp. 993 (E.D.N.Y. 1970), *aff'd*, 438 F.2d 536 (2d Cir.), *cert. denied*, 402 U.S. 995 (1971).

C. Appellant Franzese's second motion for a new trial.[3]

Appellant Franzese's second motion for a new trial on the ground of newly discovered evidence was also an attack on the credibility of the four accomplice witnesses, as had been the first motion, the appeal before that, and "a substantial part of the trial time" (*United States* v. *Franzese*, *supra*, 321 F. Supp. at 995). The petitioner presented a hearsay affidavit implying a partial recantation on the part of the witness Smith, and a statement of one Eugene Lupo, a Federal prisoner, concerning conversations purportedly had with fellow inmate John Cordero about February, 1967 in which Cordero allegedly stated that "the F.B.I. hatched a scheme which included procuring false testimony against Franzese" and that along with Smith and Parks, he became a willing participant in that scheme. Franzese also claimed that the Government was in possession of surveillance records which would prove, contrary to the testimony of the four accomplice witnesses, that he was not present at the meetings at which the bank robberies were planned during the summer of 1965. After a hearing, at which Smith testified and was cross-examined, Judge Mishler denied the motion, both as untimely and on consideration of the merits, in a Memorandum of Decision and Order entered September

---

[3] Chief Judge Mishler's unreported opinion denying this second motion of appellant Franzese has been reproduced in the Government's Appendix, included as part of this brief and cited herein as "App.". This Court dismissed the appeal in that proceeding on January 9, 1973.

20, 1972 (unreported; see Appendix, *infra*). Appeal to this Court was dismissed for lack of prosecution on January 9, 1973.

In his decision on the second new trial motion Judge Mishler reviewed the trial testimony as to the series of meetings all attended by appellant Franzese and some by appellant Potere and concluded that "[t]he evidence that these meetings took place is overwhelming" (App. 6a). Judge Mishler also noted the corroborative testimony of lawyers retained by Cordero and Parks, indicating that legal fees and other monies were paid by the conspiracy through Potere, and the checks in evidence representing payment thereof (*Id.*). The concluding portion of the decision is particularly instructive on consideration of the appeal herein (App. 6a-7a):

> The major portion of the trial record is an attack on the credibility of the four government accomplice witnesses. The voluminous 18 U.S.C. § 3500 material was used by the defendants in an attempt to show the jury that the charge against the defendants was a pure fabrication. Defendant's counsel made liberal use of inconsistent statements, communications with the United States Attorney, grand jury minutes in an attempt to show that the accomplices and particularly Cordero participated in this nefarious scheme to prove baseless charges against Franzese in expectation of payment in the form of early release. A charge that $10,000 found on Cordero at the time arrested and returned to him through error was charged to the government as a bribe—as payment for this testimony (transcript pp. 3954-5). A letter signed by Parks and Smith stating that Mr. Gillen forced them to testify was used in an attempt to show the government's participation in the alleged scheme (transcript p. 3912).

> The defendant failed to sustain the burden of showing that the newly discovered evidence is of such a nature that it would probably produce a different verdict in the event of a retrial [citation omitted]. Measured against the material that defendants' counsel had and used at the trial, to prove substantially what the new evidence is expected to show, the proffered proof is of insignificant value.

D. The Instant Motion.

1. The initial application

Seven and one-half years after trial, on November 6, 1974, appellant Franzese initiated this latest effort to overturn his conviction by a notice of motion which reveals the nature of the claim by its assertion that it is made on the ground "that the testimony of the main Government witnesses was false and perjurious . . . and . . . was or *may have been* procured, *induced* or compelled by promises of leniency by Government attorneys or their agents (emphasis added) (A-4).[4]

Appellant Potere's Notice of Motion (A-25), and the affidavit of his counsel, Henry J. Boitel (A-27, *et seq.*), put forth the single ground that "the conviction herein was secured by means of false perjurious testimony" (A-25-26).

The accompanying affidavit of Eleanor Cordero (A-5) alleged the following alleged facts supposedly inconsistent with her husband John Cordero's trial testimony: (1) that only she, as driver, John Cordero, Parks and Smith participated in the robberies on July 30 and August 13;[5]

---

[4] Page references in parenthesis preceded by "A" refer to pages in the Appellant's Appendix.

[5] The testimony at trial indicated that Anne Messineo was the driver. In her affidavit Mrs. Cordero also alleged that she had cased the bank prior to the July 30 robbery. This was allegedly inconsistent with trial testimony that Nicholas Potere had cased that bank.

(2) that she had never met Franzese or heard his name mentioned; (3) that they selected the banks at random and that no assistance in the way of floor plans or stolen cars was provided to them by anyone; (4) that her car, and not Parks', was used as the switch car in the July 30 robbery; (5) that the getaway car in the August 13 robbery was stolen from the Tavern on the Green;[6] and (6) that stolen traveler's checks were taken to Westchester for "dispos[al]" (by leaving them to be found in a public bar and thereby "cool off" the area where the robbers lived), rather than for delivery to a fence. In addition, annexed to the affidavit was a postcard from Smith postmarked July 19 in Puerto Rico. Mrs. Cordero alleged that Parks was with Smith in Puerto Rico and that after receiving the postcard she and John Cordero left for four or five days in Baltimore before Smith returned to New York (testimony at trial indicated that the first meeting with Franzese occurred in New York in late July). Finally, Eleanor Cordero's affidavit alleged that John Cordero confided to her that the four accomplices had concocted a story to involve the Polisis (A-16) and that, on perhaps January 24, 1966, he told her that they had devised a new scheme to implicate Franzese (A-17).

Although the Cordero affidavit did not even attempt to impute knowledge of the allegedly false testimony to the Government, counsel's affidavit and Memorandum of Law

---

[6] This was inconsistent with trial testimony that the car had been stolen from the Kew Motor Inn. Appellant Potere challenged the Government to resolve the discrepancy, pointing out that "its effect upon the integrity of the Government's proof is substantial" (A-38-39). The Government then submitted F.B.I. reports conclusively demonstrating that the car was stolen from the Kew Motor Inn (A-85-86). Cordero's final affidavit of March 10, 1975 "clarif[ied]" her story to conform to this information by asserting that while the actual getaway car driven by her was stolen from the Kew Motor Inn, Parks and Smith's switch car was stolen from the Tavern on the Green (A-92).

argued that the Government did have such knowledge (A-10-11, 24).[7]

2. The Government's memorandum of law

The Government responded with a memorandum (A-42) pointing out that the allegations of prosecutorial misconduct were totally unsupported by Eleanor Cordero's affidavit and that there was therefore no claim cognizable under 28 U.S.C. § 2255. The application was therefore barred by the two year limitation provision of FED. R. CRIM. P. 33, which could not be avoided by mislabeling a motion. The Government noted that in any case the motion did not fulfill the requirements for a new trial based on newly discovered evidence.

3. Appellant Franzese's supplementary memorandum with additional supporting affidavits attached

Appellant Franzese answered in turn with a memorandum and supporting affidavits; including a second affidavit from Mrs. Cordero (A-49). These papers attempted to rebut his failure to exercise due diligence in contacting Mrs. Cordero by characterizing her as somehow unavailable at an earlier time because she was the wife of a Government witness. A part of this explanation, curiously, was that Mrs. Cordero was afraid of the appellant and his representatives and that her fear continued at least through 1971 (A-51-52).[8] An affidavit was submitted by

---

[7] In other places counsel's affidavit alleges only that the Government "knew, or should have known" (A-9) or "had information that showed that John Cordero was lying" (A-10).

[8] This should be contrasted to Eleanor Cordero's subsequent affidavit of March 10, 1975, in which she asserts that in 1971 she refused to cooperate with the appellant's representatives because of fear of her husband (A-93).

one Carmine J. Pepe recounting his unsuccessful attempt to interview Eleanor Cordero in 1971 (A-63). Appellant's counsel characterized this attempt as "a strenuous effort . . . to obtain a statement . . . concerning her role in the bank robberies" (A-52).

The motion papers were aimed primarily, however, at bolstering the allegation that the Government knowingly used false testimony as to Eleanor Cordero's non-involvement (and Anne Messineo's participation) and, by implication therefrom, as to John Franzese's participation. The principal allegation to this effect was Eleanor Cordero's statement that "John Cordero, in his negotiations with the Government, was able to make a deal where I would be cut loose from the case . . . [and] Anne Messineo would be substituted in my place as the driver of the getaway cars" (A-66). Counsel concluded from this that "for the Government to deny actual knowledge of the fraud perpetrated by John Cordero, et al." would be a "contention . . . to strain our credibility [sic]" (A-57). Counsel, however presented an alternative theory that the Government may have "engaged in the 'studied avoidance' of the truth" (A-58). This was supported, argued counsel, by Mrs. Cordero's statement that no Government agent ever asked her to deny her involvement or had her viewed by eyewitnesses (A-66-67). Counsel concluded from this, the return of the $10,000 (A-59) and the severance of Anne Messineo (A-60) that "any claim by the government that Eleanor Cordero's role was unknown had to be the sheerest hypocrisy" (A-59).

Additional affidavits were submitted in order to "corroborate" Eleanor Cordero's involvement and thereby to somehow establish the credibility of her testimony as to Franzese's non-involvement.[9] Counsel for Franzese con-

[9] One was the affidavit of Eleanor Cordero's fourteen year old daughter recalling events which occurred when she was five and which, if true, did no more than to prove that when arresting

[Footnote continued on following page]

cluded that if Eleanor Cordero's testimony had been available at trial "[t]here can be no doubt . . . Mr. Franzese would have been acquitted" (A-52). It was further alleged that the Government suppressed the name of the bar in Westchester, "Wilsker's," where the "disposal" of the traveler's checks occurred, in order to avoid possible identification of Eleanor Cordero.[10]

4. The Government's reply affidavits

The Government submitted the affidavit of F.B.I. Agent Danny O. Coulson (A-78) and the 302 report of his interview with Eleanor Cordero in 1971 (A-79). In that 1971 interview, Eleanor Cordero related what had happened three days before at the 1971 meeting referred to in the affidavit of Carmine J. Pepe; that is the affidavit which showed Franzese's "strenous efforts" to obtain a statement from Mrs. Cordero. Mrs. Cordero had contacted the police when, a few months after John Cordero brutally assaulted her with a hatchet, she was summoned to the meeting with appellant Franzese's representatives. This meeting was surveilled by detectives of the New York City Police Department. In the interview Mrs. Cordero related in detail what can only be characterized as a bald attempt by Franzese's representatives[11] to intimidate and influence a witness by thinly veiled threats of violence and an overt offer of bribery. She stated, at a time when she had no reason to fear prosecution for any involvement on her part because

---

Eleanor Cordero the F.B.I. agents believed her to have been involved in the robberies (A-65). A second affidavit was a hearsay statement establishing that the stolen traveler's checks were found in a bar named "Wilsker's" (A-65).

[10] At the trial John Cordero could not recall the name of the bar. Appellant characterized this as an "incredible 'lapse of memory' . . . thoroughly consistent with the Government's cover-up" (A-55).

[11] She was told by Carmine that: "We want to get Sonny out on the street. We will do anything to get him on the street" (A-30).

the statute of limitations had run, that she was not aware that John Cordero had lied and that John Cordero never talked to her about the robberies (A-80).

The Government also submitted F.B.I. reports showing that the automobile used in the August 13 robbery was in fact stolen from the Kew Motor Inn as John Cordero had testified (A-85-87). (*See* discussion at n. 6, *supra,* at p. 9).

In addition, the Government submitted the affidavit of the prosecutor, Mr. Gillen (A-88), and an agent's report (A-90) which clearly established that Mrs. Cordero had in fact denied any role in the robberies. In an affidavit (A-70), Thomas R. Pattison, the Assistant United States Attorney assigned to the matter, pointed out that appellant had stated on his appeal of the conviction:

> In connection with the Oceanside [August 13] robbery, he [Cordero] identified a report given by him to the F.B.I. in February, 1966, in which he is reported to have stated that *despite denials from his wife Eleanor,* she was indeed involved in that robbery. Brief on Behalf of Appellant John Franzese at 27, *United States* v. *Franzese,* 392 F.2d 954 (2d Cir. 1968) (emphasis added).

The Pattison affidavit further pointed out that a review of the record showed that the Government, rather than having concealed any allegations of Eleanor Cordero's involvement, voluntarily disclosed to the defense John Cordero's prior statement concerning his wife's role, the fact that the money seized from her had been returned, and the information leading up to her arrest (A-72). At the trial itself, John Cordero admitted that Eleanor drove the car in the August 13 robbery (Tr. 2005).

The Pattison affidavit further analyzed the trial record in order to refute the contention that the Government de-

liberately concealed the name "Wilsker's" (A-71-73). The prosecution actually attempted to offer the checks found at Wilsker's into evidence, and even after successfully blocking their admission the defense was free to inquire as to the location of the seizure.

Finally, the Pattison affidavit pointed out that no sufficient factually supported allegations had been made concerning prosecutorial misconduct and that most, if not all the matters raised by the appellants as to Eleanor Cordero's involvement and corroboration thereof were considered and rejected by the trial jury and by various appellate courts. Therefore, there was no significant newly discovered evidence brought forth on the instant motion (A-75-77).

5. The district court's memorandum of decision and order

The district court phrased the issues on this motion as based on the affidavits of Eleanor Cordero in which she asserts that trial testimony "was false and perjurious and known by the government to be false and perjurious in several respects" (A-94). After summarizing the allegedly false and perjurious testimony (A-95-96), the court took note of the 1971 interview report of Agent Danny Coulson (A-96-97) and the F.B.I. reports consistent with John Cordero's testimony as to the stolen car used in the August 13 robbery (A-97).

The court, having conducted its own thorough review of the trial transcript, concluded that there was no substantial evidence of false or perjurious testimony. The court disposed of Mrs. Cordero's allegations seriatum, and made the following findings:

> (1) The evidence that Smith and Parks were in Puerto Rico on July 19, 1965, is not inconsistent with the trial testimony as to the approximate date of the first meeting with defendant Franzese (A-97-98).

(2) The record is replete with testimony as to Mrs. Cordero's participation in the bank robberies and shows that the government revealed everything it knew concerning her role (A-98-99). The court stated in conclusion that "[d]espite Cordero's attempts at times to exculpate his wife or minimize her role, the jury was advised that his wife did have a role in one or more of the armed bank robberies" (A-99). Therefore, appellants had shown no false or perjurious testimony regarding Eleanor Cordero's role and no suppression of evidence by the Government.

(3) Testimony as to where the stolen checks were found was lost when the defense successfully opposed their admission into evidence; where they were found was of little significance; and the disposal scheme alleged by Mrs. Cordero was incredible (A-100).

Finding absolutely no convincing proof of false or perjurious testimony and no substantial factual issue raising a claim under 28 U.S.C. § 2255, the court reviewed the standards for a new trial based on newly discovered evidence and found that the petitioners had failed to meet the burden imposed by that more inclusive standard as well. Noting that the testimony of Charles Zaher, which was limited to corroboration of the others as to the first meeting with Franzese, was not under attack on this motion,[12] and

[12] Eleanor Cordero did not even attempt to account for Zaher's whereabouts at the time of the meeting with Franzese in late July and he did not testify as to any other matter allegedly inconsistent with her assertions. It should also be recalled that Mrs. Cordero alleged that *only* she, John Cordero, Smith and Parks were involved in the July 30 robbery (A-14), thereby admitting her role, but after the statute of limitations had run. Charles Zaher, on the other hand, was a confessed participant who pled guilty to conspiracy to effectuate that robbery. *United States* v. *Polisi*,

[Footnote continued on following page]

noting the extensive attack on the credibility of the four accomplice witnesses at trial, the court found that the testimony of Eleanor Cordero as outlined in her affidavits "would not product a different verdict in event of a retrial." [15] Having exhausted every area of attack, including those not properly before the court under 28 U.S.C. § 2255, the court denied the motion in all respects (A-101-03).

ARGUMENT

POINT I

The district court properly denied appellants' motion without an evidentiary hearing.

28 U.S.C. § 2255 requires an evidentiary hearing on constitutional claims raising disputed issues of fact unless a trial or appellate court has determined the same claim adversely to the applicant on the merits (see argument, Point II, *infra*) and "unless *the motion* and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (1970). (Emphasis added).

The appellants alleged, under § 2255, that their convictions were obtained through false and perjurious testi-

---

supra, 416 F.2d at 575. His only involvement with it was attendance at the meeti[illegible]ith appellant Franzese in late July. *United States* v. *Franzese*, *supra*, 392 F.2d at 960. n. 8. It should also be noted that Zaher was not indicted in the Franzese indictment and therefore could not have been, as alleged by Eleanor Cordero, testifying as part of a deal with the prosecution.

[13] Appellant Potere argues that Judge Mishler "relied upon the easiest and weakest course of determination" in finding that the verdict would not have been different had Eleanor Cordero's "evidence" been available at the trial. We cannot help but note at this juncture that such a course of determination is neither "easy" nor "weak". *See United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975).

mony.[14] An allegation of perjured testimony, alone, affords no basis for collateral relief apart from allegations of its knowing use by the Government. *United States* v. *Spadafora*, 200 F.2d 140 (7th Cir. 1952); *Hoffa* v. *United States*, 339 F. Supp. 398, 392-93 (D.C. Tenn. 1972), *aff'd*, 471 F.2d 391 (6th Cir.), *cert. denied*, 414 U.S. 880 (1973); *United States* v. *Gonzales*, 33 F.R.D. 280, 282 (S.D.N.Y.), *aff'd*, 321 F.2d 632 (2d Cir. 1968); *cf. Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). *See also Kaufman* v. *United States*, 394 U.S. 217, 223-26 (1969) (§ 2255 is not available for non-constitutional claims). *See* discussion in *McBride* v. *United States*, 446 F.2d 229, 232 (10th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972) where the court held that no hearing was required on an affidavit containing conclusory statements that the witness had told the affiant he was lying at the trial. Thus, a petitioner alleging the Government's knowing use of perjured testimony under 28 U.S.C. § 2255 has the burden of proving both that the testimony was in fact perjured and that the Government knew that it was so at the time of its use. *Crismon* v. *United States*, 510 F.2d 356, 357 (8th Cir. 1975); *Dansby* v. *United States*, 291 F. Supp. 790, 793 (S.D.N.Y. 1968). This burden, as that in any case where post-conviction relief is sought based on violation of constitutional rights, must be sustained "not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

The law does not require an exercise in futility and it is well established that "a district court has discretion before granting an evidentiary hearing to ascertain whether the claim is substantial." *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974) (per curiam); *see Walker* v. *Johnston*, 312 U.S. 275, 286 (1941) (a hearing is required where the motion papers "raise substantial issues of fact"). As

---

[14] As appellants initiated their motion over seven and one half years after trial, all of their claims not involving prosecutorial misconduct are barred by the two year jurisdictional time limitation of FED. R. CRIM. P. 33. *See United States* v. *Robinson*, 361 U.S. 220, 224-26 (1960) (excusable neglect is not an exception); *United States* v. *Smith*, 331 U.S. 469, 473 (1947).

this Court stated in *Dalli* v. *United States*, 491 F.2d 758, 760-61 (2d Cir. 1974):

> [T]his Court takes a dim view of any summary rejection of a petition for post conviction relief when supported by a "*sufficient* affidavit." See Taylor v. United States, 487 F.2d 307 (2d Cir. Nov. 14, 1973). But . . . a judge is well within his discretion in denying a petition when the supporting affidavit is insufficient on its face to warrant a hearing. . . . In making that threshold determination the court looks primarily to the affidavit or other evidence proffered in support of the application to determine whether, if the evidence should be offered at a hearing, it would be admissible proof entitling the petitioner to relief. Mere generalities or hearsay statements will not normally entitle the applicant to a hearing. . . . The petitioner must set forth specific facts which he is in a position to establish by competent evidence. [Citation omitted].

In making the threshold determination of substantiality a district court requires "charges which are detailed and specific." *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962); *see, e.g., Fontaine* v. *United States*, 411 U.S. 213 (1973). "A hearing is not required . . . where the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous." *United States* v. *Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970).

Appellants' affidavits do not qualify under the above standards as proper evidential material to support a § 2255 application and did not require that a hearing be held in the district court. There was no bona fide disputed factual issue requiring one. The motion papers made bald assertions of one cognizable claim—that the Government knowingly used false and perjurious testimony (1) that Eleanor Cordero was not a participant in the robbery scheme and (2) that the appellants were participants in that scheme—without adequate supporting factual allegations.

1. That Eleanor Cordero was not a participant in the robbery scheme.

The obvious predicate for knowing use of perjury is perjury itself. To support a finding of perjury "there must be evidence sufficient so that the Court can fairly state that it is 'reasonably well satisfied' that the testimony given at the trial by a material witness is false." *United States* v. *Aviles*, 197 F. Supp. 536, 545 (S.D.N.Y. 1961), *aff'd*, 315 F.2d 186 (2d Cir.), *remanded on other grounds*, 375 U.S. 32 (1963), *aff'd*, 337 F.2d 552 (2d Cir.), *cert. denied*, 380 U.S. 906 (1964). The district court's opinion ably explains that, comparing appellants' affidavits to the trial transcript, the facts and records of the case show that there was no false or perjurious testimony as to Eleanor Cordero's participation in the robbery scheme (A-98-99). The affidavits as to her role are merely cumulative on a phase of the case fully developed at the trial. The court also found that there was no suppression of any information relative to the disposal of the traveler's checks (A-100). These are the kind of findings, here fairly supported by the evidence, for which an appellate court should not substitute its own judgment. *See United States* v. *Johnson*, 327 U.S. 106, 111-12 (1946).

Appellants argue, however, that Mrs. Cordero's somewhat more extensive role as now alleged must have been known to the Government at trial and therefore suppressed. This conclusory allegation is made from time to time in the motion papers. *See, e.g.*, (A. 61-62) ("under no view of the facts did the government not know"). The purpose of disclosure, however, is to provide a defendant "exculpatory evidence known to the government but unknown to him." *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir), *cert. denied*, 412 U.S. 939 (1973); *accord*, *Williams* v. *United States*, *supra*, 503 F.2d at 998. No disclosure is required when the defense is "on notice of the essential facts required to enable [it to interview a witness whose testimony is potentially exculpatory and to take advantage of that

testimony, through compulsory process if need be]. *United States* v. *Ruggiero, supra,* 472 F.2d at 604-05. As was stated in response to the same charge on appellants' direct appeal, "nothing prevented the defense from calling Mrs. Cordero." *United States* v. *Franzese, supra,* 392 F.2d at 962-63.

Appellants assert in the alternative that if the Government did not have full knowledge of Eleanor Cordero's role, it was due to a "studied avoidance of the truth" Appellant's Brief (Franzese) at 30, *et. seq.*) making the prosecution "the active and effective cause of the nondisclosure of the evidence . . . [which it enshrouded in a fog, and if not willfully, then *de facto* suppressed]." *People* v. *Maynard,* 80 Misc. 2d 279, 287, 363 N.Y.S.2d 384, 394 (Sup. Ct., N.Y. County 1974). In the context of the instant motion this is plainly vague and conclusory speculation. It might also be noted that the *Maynard* case involved continuous specific requests for evidence (of the most basic discoverable kind—a witness' criminal record) which was in the hands of a prosecution already involved in charges of misconduct, which the court had specifically ordered produced and which turned out to be crucial to the defense case.

2. That appellants were participants in the robbery scheme

In her affidavits Eleanor Cordero alleges that the appellants were, "to her knowledge," not participants in the scheme and that John Cordero confided to her that he and the other accomplice witnesses were perjuring themselves in testifying that the appellants were. Appellants make no claim, however, that the Government knew of this alleged perjury, except as it appears by way of innuendo in their motion papers. They do claim that the Government suppressed "a deal" made with the witnesses.

A district court is given "broad discretion in deciding whether new evidence is credible." *United States* v. *Maddox*, 444 F.2d 148, 152 (2d Cir. 1971).[15] In fact, one of the purposes of 28 U.S.C. § 2255 was to allow for use of the trial court's personal knowledge of the trial. *Mirra* v. *United States*, 379 F.2d 782, 788 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967). Accordingly, the district court's findings on a § 2255 motion are disturbed only if "clearly erroneous." *United States* v. *Pfingst*, 490 F.2d 262, 273 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974) (dicta); *Zovluck* v. *United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

In its memorandum the district court reviewed some of the Government affidavits clearly pertinent to deciding the issues presented, but no reliance was placed explicitly upon them, and none was necessary. As the Supreme Court has stated, "[t]he language of the statute [§ 2255] does not strip the district courts of all discretion to exercise their common sense." *Machibroda* v. *United States*, *supra*, 368 U.S. at 495. The district court was aware that appellants are powerful organized crime figures and that testimony as to their past conduct indicated that they would stop at nothing to gain their release. The court was able to observe the sequence of the appellants' motion papers and their contradictory assertions as to Governmental misconduct. It has been observed that a post-trial affidavit by one who did not testify therein is the "weakest sort of evidence." *Dirring* v. *United States*, 353 F.2d 519, 520 (1st Cir. 1965). Within the borders of her own affidavits Mrs. Cordero effectively impeached her own credibility by her changing story as to the place from where the getaway car for the August 13 robbery was stolen (see discussion, *supra* at 9, n. 6). Most importantly, the

---

[15] This is especially so "in cases involving long complicated trials." *United States* v. *Zane*, 507 F.2d 346, 348 (2d Cir. 1974), *cert. denied*, 95 S. Ct. 1563 (1975). The transcript of appellants' trial is approximately 4,400 pages. *United States* v. *Franzese*, *supra*, 321 F. Supp. at 994.

district judge could properly interpret the allegations in light of the trial testimony which overwhelmingly contradicted them. *See Williams* v. *United States*, *supra*, 503 F.2d at 998; *United States* v. *Curry*, 497 F.2d 99, 101 (5th Cir. 1974).

In light of the trial testimony by the four accomplice witnesses and the corroborating testimony presented, the allegations that appellants were not involved are not only vague and conclusory, but patently frivolous. The trial testimony inculpating the appellants was not shown to be false. Even crediting Eleanor Cordero's allegations as to her own role, her involvement was not, appellant's assertions notwithstanding, such as to give her definitive knowledge of who was involved in the robbery scheme.

Mrs. Cordero's statements as to John Cordero's alleged admissions of perjury, even if admitted as a declaration against interest,[16] represent hearsay as to his acts of perjury and would be inadmissible at a hearing. *See Dalli* v. *United States*, *supra*, 491 F.2d at 760-61; *United States* v. *Bostic*, 360 F. Supp. 1305 (E.D. Pa. 1973).

The Government's affidavits further demonstrate the frivolous and incredible nature of the appellant's allegations. Agent Coulson's affidavit (A-78) is particularly instructive. It makes clear the suspicious origins of Eleanor Cordero's affidavits in circumstances suggesting the possibility of coercion or bribery. This is a proper consideration on motions alleging that false testimony was given at trial. *See, e.g., United States* v. *Johnson*, 487 F.2d 1278 (5th Cir. 1973); *United States* v. *Persico*, 399 F. Supp. 1077 (E.D.N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 946 (1973). The interview report

---

[16] It should be noted, however, that John Cordero was not unavailable and that more than five years having passed, he could claim no fifth amendment privilege.

also contains statements by Eleanor Cordero in 1971 flatly contradicting her new allegation that John Cordero committed perjury.

As mentioned above, the district court did not rely on the Government affidavits. Appellants argue that such affidavits are not part of "the motion and files and records of the case" and, therefore, are inadmissible on a § 2255 motion.[17] This Court, however, has recently reaffirmed the use of Government affidavits such as those submitted below:

> "Although opposing affidavits from the Government cannot be deemed part of the records and files of a case for purpose of showing that the petitioner is entitled to no relief under 28 U.S.C. § 2255, Taylor v. United States, 487 F.2d 307 (2d Cir. Nov. 14, 1973), they may be considered in assessing the sufficiency of the petitioner's supporting affidavit. See United States v. Catalano, 281 F.2d 184 (2d Cir.), *cert. denied*, 364 U.S. 845, 81 S.Ct. 88, 5 L.Ed.2d 69 (1960)." *Dalli* v. *United States*, *supra*, 491 F.2d at 762, n. 4. *Accord*, *United States* v. *Salerno*, 290 F.2d 105, 106 (2d Cir. 1961). *Compare Coppenhaver v. Bennett*, 355 F.2d 417, 421 (8th Cir. 1966) *with Crispo* v. *United States*, 443 F.2d 13 (9th Cir. 1971).

If appellants have alleged that the Government was aware that the testimony inculpating the appellants was false or that the Government suppressed evidence that it was false, it is a plainly frivolous claim without any specification or averment to support it. "Before evidence can be suppressed it is necessary that the prosecution be aware of its very existence." *United States* v. *Persico*, *supra*, 339 F. Supp. at 1090; *accord*, *United States* v. *Marquez*,

---

[17] In this argument, the appellants radically depart from their prior insistence on the significance of the Government's failure "to deny by affidavit Mrs. Eleanor Cordero's allegations" (A. 60).

363 F. Supp. 802, 806 (S.D.N.Y. 1973), *aff'd mem.*, 490 F.2d 1383 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974). Appellants' affidavits herein are not nearly so conclusive as the "equivocal statements" found insufficient to establish the Government's knowledge in *Williams* v. *United States, supra*, 503 F.2d at 998. The instant case closely parallels *Boisen* v. *United States*, 181 F. Supp. 349 (S.D.N.Y. 1960 where the following conclusion was reached (*id.* at 351):

> In the instant petition there is not even a direct allegation that the allegedly perjured testimony was knowingly and intentionally used. Even if such a charge may be read by innuendo out of the petition, it remains a mere conclusory allegation, unsupported by any facts.

Appellants' procrustean technique is underscored when these claims are viewed under the applicable standard which states that "[t]o relieve the defendant of his duty of due diligence [see argument, Point II, *infra*], the evidence of prosecutorial suppression should be clear and unequivocal." *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 20 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969).

It should also be noted that an evidentiary hearing is not permissible for purposes of enabling petitioners to obtain proof of Government knowledge. *See United States* v. *Kahn*, 472 F.2d 272, 289, n. 20 (2d Cir.) *cert. denied*, 411 U.S. 982 (1973); *United States* v. *DeSapio*, 456 F.2d 644, 652 (2d Cir.) *cert. denied*, 406 U.S. 933 (1972). Finally, any "deal" between the Government and the accomplice witnesses was a part of the trial record. *See* Brief on Behalf of Appellant Franzese at 26-37; *United States* v. *Franzese*, *supra*.

POINT II

The district court could have properly exercised its discretion to deny appellants' application without any consideration of its merits.

"[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be relitigated in a post-conviction collateral attack." *Meyers* v. *United States*, 446 F.2d 37, 38 (2d Cir. 1971). The same is true as to determinations made on prior applications for post-conviction relief. *See, e.g., Saville* v. *United States*, 451 F.2d 649 (1st Cir. 1971). The claims raised by appellants on this motion would therefore be barred by their previous determination on their merits, by the jury at trial and the court on appeal (see discussion, *supra* at 4-5, 7, 15) and on appellant Franzese's second new trial motion (see discussion, *supra* at 6-8), absent "a substantial allegation of newly discovered evidence." *Kaufman* v. *United States*, *supra*, 394 U.S. at 226. If such newly discovered evidence is claimed, "greater specificity is required than if no hearing had been held, in order to avoid relitigation of issues on the basis of proof already deemed insufficient." *Dalli* v. *United States*, *supra*, 491 F.2d at 761.

The newly discovered evidence must be "evidence which could not reasonably have been presented [at an earlier proceeding]. . . . [It] . . . must bear upon the constitutionality of the applicant's detention. . . . Also the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation. . . ." *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963). Appellants have plainly failed to exercise due diligence[18] in presenting the affidavits of

---

[18] *Davis* v. *United States*, 411 U.S. 233, 256 (1973) (Marshall, J., dissenting on other grounds): "I have little difficulty in saying that where one must present evidence in order to support a constitutional claim, the failure to exercise due diligence in searching for that evidence is a deliberate relinquishment of that claim."

Eleanor Cordero over seven and one half years after trial. She was available to them at trial (*see discussion, supra* at 19-20). *See United States* v. *Edwards*, 366 F.2d 853, 873-74 (2d Cir. 1966), *cert. denied*, 336 U.S. 90[illegible] (1967); *United States* v. *Costello*, 255 F.2d 876, 879 [illegible] Cir.), *cert. denied*, 357 U.S. 937 (1958). Withholding witness at trial or on one motion and then seeking to present his testimony at a later collateral attack is uniformly condemned. *See, e.g., United States* v. *Gironda*, 283 F.2d 911 (2d Cir. 1960), *cert. denied*, 365 U.S. 852 (1961).

The instant case arises precisely at the point where the bar against applications on grounds previously heard intersects with abuse of the § 2255 remedy, an affirmative defense raised by the Government below (A. 45-46). *See Sanders* v. *United States*, 373 U.S. 1, 10 (1963). The allegations of "knowing use" were clearly added in an attempt to escape the bar against litigation of claims previously decided. *See Wapnick* v. *United States*, 311 F. Supp. 183 (E.D.N.Y. 1969), *aff'd*, 423 F.2d 1361 (2d Cir.) (per curiam) *cert. denied*, 400 U.S. 845 (1970).

POINT III

The district court properly refused appellant Potere's request that it compel the production of an informant, or alternatively direct the Government to file under seal any and all information concerning, or derived from, the informant.

In his request appellant Potere sought to reopen an issue raised, fully explored and rejected upon the trial and on direct appeal. *See United States* v. *Franzese*, *supra*, 392 F.2d at 961-63. Furthermore, it was a discovery motion neither necessary, nor appropriate in the context of a motion to vacate.

The application of discovery procedures to 28 U.S.C. § 2255's statutory counterpart, habeas corpus, where not necessary to a fair and meaningful evidentiary hearing has been held to

> "do violence to the efficient and effective administration of the Great Writ. The burden upon courts, prison officials, prosecutors, and police, would be vastly increased; and the benefit to prisoners would be counterbalanced by the delay which the elaborate discovery procedures would necessarily entail." *Harris* v. *Nelson,* 394 U.S. 286, 297 (1969).

The instant case was not one where discovery would be appropriate in a hearing already being conducted. *See, e.g., United States* v. *Wolfson,* 413 F.2d 804 (2d Cir. 1969). Nor was it a case where specific discovery might be ordered at a hearing in lieu of oral testimony which would otherwise be required. *See, e.g., Reed* v. *United States,* 438 F.2d 1154 (10th Cir. 1971). Nor was it a case where the petitioner requested interrogatories from affiants. *See, e.g., Coppenhaver* v. *Bennett, supra.*

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

Dated: August 14, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
*Of Counsel.**

---

* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Morton J. Marshack in the preparation of this brief. Mr. Marshack is a third year law student at Hofstra Law School.

APPENDIX

Memorandum of Decision and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66—Cr.—161

UNITED STATES OF AMERICA,

—against—

JOHN FRANZESE,

Defendant.

September 20, 1972

Defendant moves for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the ground of newly discovered evidence. Defendant was tried together with William David Crabbe, John Matera, Nicholas Potere and Joseph M. Florio to a jury on charges of armed bank robbery and conspiracy to commit armed bank robbery. The trial commenced January 31, 1967 and ended on March 2, 1967. A judgment of conviction was entered on April 14, 1967. The judgment of conviction was affirmed, 392 F.2d 954 (2d Cir. 1968). The judgment of conviction was vacated by the Supreme Court and a hearing directed to determine whether an electronic listening device installed at the defendant's home 47 Shrub Hollow Road, Roslyn, Long Island, tainted the evidence introduced at the trial. The court in a memorandum of decision dated March 26, 1970 directed that a new final judgment of conviction be

entered.[1] A final judgment was thereupon filed on March 26, 1970.

The defendant moved for a new trial on May 21, 1970[2] on the ground that the United States Attorney, Joseph P. Hoey, testified to interviews he had with the government's witnesses John Joseph Cordero, Richard Paul Parks, James Joseph Smith and Charles Zaher at the Federal Correctional Institution at Danbury, Connecticut, on March 11, 1966. The basis of that motion was the failure of the government to turn over a memorandum of those interviews dated March 14, 1966. The motion was denied in a memorandum of decision dated August 12, 1970. (Affirmed 2d Cir., March 2, 1971—unreported).

Rule 33 of the Rules of Criminal Procedure:

> "The court may grant a new trial to the defendant if required in the interest of justice . . . a motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, . . ."

Rule 45(b) of the Rules of Criminal Procedure denies the court the power to enlarge the period fixed in Rule 33 for making a motion for a new trial on the ground of newly discovered evidence. *United States* v. *Robinson*, 361 U.S.

---

[1] The court found in its memorandum of decision of March 26, 1970:

> "(c). Parks met Franzese for the first time in 1963. (Trial transcript, p. 2370).
>
> (d). Zaher met Franzese for the first time in 1964. (Trial transcript, p. 1453)."

[2] A portion of the testimony given by Mr. Hoey before Judge Dooling indicated that the government witnesses were bargaining for consideration in the sentences which were to be imposed on charges to which they had pleaded guilty.

220, 224, 80 S.Ct. 282, 285-286 (1960). The time limitation is jurisdictional. *United States* v. *Smith,* 331 U.S. 469, 67 S.Ct. 1330 (1947); *Jacobanis* v. *United States,* 256 F.2d 485, 486 (1st Cir. 1958); *Oddo* v. *United States,* 171 F.2d 854, 858; 2 Wright Federal Practice and Procedure § 558.

The instant motion was made by serving and filing a notice of motion on May 30, 1972, more than two years from the date on which the final judgment of conviction was filed in the office of the Clerk of this court. The motion is, therefore, untimely. The court will nevertheless consider the merits of the motion.

This motion is (1) an attack on the credibility of the four accomplice witnesses and (2) a claim that the F.B.I. and police officials of the City of New York and the County of Nassau have within their possession records of surveillance of the defendant which would prove that the defendant was not present "at certain meetings at which bank robberies were planned during the summer of 1965." (Paragraph 4 affidavit of Elliot A. Taikeff). The credibility of James Joseph Smith is attacked in an affidavit by James M. LaRossa, an attorney, who represented the defendant in the proceeding before the Supreme Court. Mr. LaRossa states that he spoke with former Assistant United States Attorney Michael Gillen who was in charge of the prosecution of the case against the defendant, who advised Mr. LaRossa that a Queens County Assistant District Attorney Mosely told him (Mr. Gillen) that 'Mr. Smith told Mr. Mosely that although he had testified to his own participation at the 1965 meeting as a witness at the federal trial he was not at that meeting and that he would not so testify at the state trial."[3] The attack against the credibility of all four gov-

[3] Subsequent to the trial in the above proceeding the defendant was tried on the charge of murder in the Supreme Court, Queens County. He was acquitted.

ernment witnesses is made in a statement dated May 14, 1971 by one Eugene Lupo. He claims that while he was confined to Sandstone Federal Correctional Institution he met John Joseph Cordero who described a way of early release from prison; his statement recites that the F.B.I. hatched a scheme which included procuring false testimony against Franzese to support a charge of bank robbery and bank robbery conspiracy. Mr. Lupo says that Mr. Cordero told him that "he didn't know Sonny" but that the defendant Franzese was the one they ". . . would really like to get." Mr. Lupo states that Cordero told him that he became a willing participant with Smith and Parks.

The claim that government's records of surveillance would exculpate the defendant is made through a retired New York City police officer who describes the existence of a "Pizza Squad" to keep certain individuals under constant surveillance, i.e., Joseph Colombo, Sr., Sebastian "Buster" Aloi, John "Sonny" Franzese and Philip Rastelli. He further states that reports of their surveillance activities ". . . were routinely supplied to the Criminal Investigation Bureau and according to certain former policemen I have spoken to, the C.I.B. supplied the Federal Bureau of Investigation with copies of surveillance reports on the most important alleged members of 'organized crime'." A neighbor and a former houseworker at the Franzese home submitted affidavits indicating that the Franzese home was under constant surveillance over a long period of time. The defendant's wife submits a copy of a gossip column printed in Newsday on August 6, 1963, which reports:

> "Racketeer bossman Sonny Franzese of Long Island territory may not know it but he has had a companion these past few weeks who's been watching him stroll into at least five local restaurants where the food and drinks have been on the house. The silent watcher is trying to determine Sonny's hidden interest in the bistros."

Memorandum of Decision and Order

In opposition to the motion Assistant District Attorney Mosely states that he went over the testimony that Mr. Smith had to offer. That Mr. Smith was ready to testify against the defendant and substantially repeated the testimony concerning a meeting at the Aqueduct Motor Inn out of court. He decided not to use Smith's testimony. Mr. Mosely denied telling Mr. Gillen that Mr. Smith had stated that his testimony at the federal trial was false. Mr. Smith in an affidavit and through oral testimony submitted at an open hearing subject to cross-examination flatly denied the allegations made in Mr. LaRossa's affidavit. Special Agent James T. Molloy in charge of the Federal Bureau of Investigation assigned to investigate the defendant during the year 1965 denies that there was any surveillance of the defendant Franzese during 1965, denies knowledge of any surveillance of the New York City Police Department or any other law enforcement agency and states that the F.B.I. does not receive surveillance logs from the "Pizza Squad or any other branch of the New York City Police Department."

The Court again reviewed the pertinent portions of the testimony. The four government witnesses Cordero, Parks, Smith and Zaher all testified to a meeting at the Aqueduct Motor Inn on or about July 19-July 22, 1965. They testified that they were first at the bar of the Motor Inn. They identified the defendants Franzese, Crabtree, Matera and Florio as present at the meeting. None of the defendants except Matera offered proof of absence from that meeting.[4] There was testimony of other meetings at which Franzese was present to discuss the business of the conspiracy. Parks testified to a meeting with the defendant Franzese and

[4] Matera offered one Harry Ahnert (transcript 3404, et seq.), Mary Patricia Scotto (transcript 3488, et seq.), Carmela Principe (transcript p. 3487, et seq.).

Florio at the Flagship Diner on Queens Boulevard, in Queens (Transcript p. 2681). Cordero testified to a meeting with Franzese, Potere and Florio at an apartment listed to one John Valenti and the defendant Potere (Potere used the pseudonym Nicholas Apollo at apartment 5A in 8316 Lefferts Boulevard, Kew Gardens (transcript p. 1821 and 2445)). The evidence that these meetings took place is overwhelming. Corroborative testimony from lawyers retained by Cordero and Parks indicating that legal fees and other moneys were paid by the conspiracy through Potere (transcript p. 2700, p. 2782), in accordance with the conspiracy understanding was offered by the government. Checks representing payment were produced.

Testimony by Mr. LaRossa concerning a conversation he had with Mr. Gillen concerning a conversation he had with Mr. Mosely would not be admitted into evidence. The records defendant seeks do not exist. The only "new evidence" is a statement of Mr. Lupo concerning conversations allegedly had with Mr. Cordero.[5]

The major portion of the trial record is an attack on the credibility of the four government accomplice witnesses. The voluminous 18 U.S.C. § 3500 material was used by the defendants in an attempt to show the jury that the charge against the defendants was a pure fabrication. Defendant's counsel made liberal use of inconsistent statements, communications with the United States Attorney, grand jury minutes in an attempt to show that the accomplices and particularly Cordero participated in this nefarious scheme to prove baseless charges against Franzese in expectation of payment in the form of early release. A charge that $10,000 found on Cordero at the time arrested and returned to him through error was charged to

---

[5] The court notes that the alleged conversations were purportedly held about February 1967.

the government as a bribe—as payment for this testimony (transcript pp. 3954-5). A letter signed by Parks and Smith stating that Mr. Gillen forced them to testify was used in an attempt to show the government's participation in the alleged scheme (transcript p. 3912).

The defendant failed to sustain the burden of showing that the newly discovered evidence is of such nature that it would probably produce a different verdict in the event of a retrial. *United States* v. *Lombardozzi*, 236 F.Supp. 957 (E.D.N.Y. 1964), *aff'd*, 343 F.2d 127 (2d Cir.), *cert. denied*, 381 U.S. 938, 85 S.Ct. 1771 (1965). Measured against the material that defendants' counsel had and used at the trial, to prove substantially what the new evidence is expected to show, the proffered proof is of insignificant value.

The court finds that the newly discovered testimony would not produce a different verdict in the event of retrial.

The motion is in all respects denied, and it is
SO ORDERED.

JACOB MISHLER

.....

U.S.D.J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 18th day of August, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Lyon & Erlbaum, Esq.
123-60 83rd Avenue
Kew Gardens, N.Y. 11415

Henry J. Boitel
233 Broadway
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
18th day of August, 1975
Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

.KE NOTICE that the within
ed for **settlement and signa-**
rk of the United States Dis-
nis office at the U. S. Court-
iman Plaza East, Brooklyn,
he ____ day of _____,
0 o'clock in the forenoon.

n, New York,
_____, 19____

_____
States Attorney,
y for _____

_____
_____
_____
_____

KE NOTICE that the within
of _____duly **entered**
__ day of _____
, in the office of the Clerk of
:t Court for the Eastern Dis-
rk,
ı, New York,
_____, 19____
_____
States Attorney,
/ for _____

_____
_____
_____
_____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-BM-8-73-7355